JUN 28 2001

Supreme Court, U.S.
FILED
JUN 28 2001
OFFICE OF THE CLERK

No. 00-758

IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENT

GREGORY O'DUDEN *
General Counsel
BARBARA A. ATKIN
Deputy General Counsel
KERRY L. ADAMS
Associate General Counsel
NATIONAL TREASURY
EMPLOYEES UNION
901 E. Street, N.W.
Washington, D.C. 20004
(202) 783-4444

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

28 pp

QUESTION PRESENTED

Whether the Merit Systems Protection Board, in reviewing a federal agency's disciplinary action against an employee, may rely on prior disciplinary actions that are the subject of pending grievance proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS*	1
STATUTORY BACKGROUND	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THE RULING BELOW CORRECTLY CONSTRUES THE SCOPE OF THE MSPB'S AUTHORITY OVER ADVERSE ACTION APPEALS WHOSE VALIDITY DEPENDS ON THE OUTCOME OF PENDING GRIEVANCE AND ARBITRATION PROCEEDINGS	7
A. The Federal Circuit's Decision Does Not Affect Management's Ability to Impose Adverse Action Based on Prior Discipline	7
B. The Ruling Below Properly Interprets the MSPB's Statutory Authority, As Balanced Against the Complementary Jurisdiction of Arbitrators	8
C. The Ruling Below Promotes Efficiency	12
D. The Board's Position Violates Its Own Principle of Fundamental Fairness	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

AFGE, Local 215 and Dep't of Health and Human Servs., Social Security Admin., Office of Hearings and Appeals, 93 FLRR 2-1373 (1993) 17
AFGE, Local 2029, 48 FLRA 95 (1993) 16
AFGE, Local 2369, 23 FLRA 304 (1986) 9
Blank v. Dep't of the Army, 247 F.3d 1225 (2001) 15-16
Bolling v. Dep't of the Air Force, 8 M.S.P.R. 335 (1981) 10, 11
Carr v. Dept. of the Air Force, 9 M.S.P.R. 714 (1982) 10
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 18
Cornelius v. Nutt, 472 U.S. 653 (1985) 4
Delgado v. Dep't of the Air Force, 36 M.S.P.R. 685 (1988) 11
Dep't of Defense, Air Force, Seymour Johnson AFB and NAGE Local R5-188, 56 FLRA 249 (2000) 19
Devine v. White, 697 F.2d 421 (D.C. Cir. 1983) 19
Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981) 9
Eichner v. U.S. Postal Service, 83 M.S.P.R. 202 (1999) 11
Fenwick v. Dep't of Veterans Affairs, 100 F.M.S.R. 84542 (2000) 13
Figueroa v. Dep't of Treasury, 98 F.M.S.R. 84655 (1998) 14
Freeman v. Dep't of Transp., 20 M.S.P.R. 714 (1982) 10
Gilbert v. Homar, 520 U.S. 924 (1997) 18
Hall v. Tennessee Valley Authority, 96 F.M.S.R. 80050 (1997) 14

TABLE OF AUTHORITIES—Continued

Page

Harris v. Dept. of Transp., 29 M.S.P.R. 430 (1985) 13
Howard v. Dep't of the Army, 6 M.S.P.R. 205 (1981) 6, 8, 17
Hubbard v. U.S. Postal Service, 32 M.S.P.R. 505 (1987) 11
In re Arbitration between Island Creek Coal Co. and UMW, 1996 WL 607192 (Case No. 93-23-96-06) (March 15, 1996) 12
Jones v. Dep't of the Air Force, 24 M.S.P.R. 429 (1984) 8
Jones v. United States, 526 U.S. 227 (1999) 17
Key v. U.S. Postal Service, 31 M.S.P.R. 197 (1986) 13
Lachance v. Devall, 178 F.3d 1246 (Fed. Cir.1999) 4, 9
Lachance v. Erickson, 522 U.S. 262 (1998) 18
Metal Trades Council, 87 FLRR 2-1497, LAIRS 18045 (1987) 12
Milner v. Dep't of Justice, 87 M.S.P.R 660 (2001) 13, 19
Morales v. Dep't of the Navy, 100 F.M.S.R. 84248 (2000) 12
Morgan v. Dep't of Justice, 63 M.S.P.R. 58 (1994) 11
Overseas Federation of Teachers, AFT and DOD Dependents School, 32 FLRA 410 (1988) 19
Powell v. Dep't of Defense, 2001 MSPB LEXIS 508 (MSPB Docket No. AT-0752-00-0746-I-1) (June 7, 2001) 16
Pride v. U.S. Postal Service, 100 F.M.S.R. 84426 (2000) 12
Rewald v. U.S. Postal Service, 34 M.S.P.R. 13 (1987) 11

TABLE OF AUTHORITIES—Continued

	Page
Rios v. Dep't of Veterans Affairs, 100 F.M.S.R. 84209 (2000)	12-13
Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984)	15
Taylor v. Dep't of Justice, 60 M.S.P.R. 686 (1994)	11
Thomas v. U.S. Postal Service, 97 F.M.S.R. 82584 (1997)	14
Thomas v. Dep't of Veterans Affairs, 51 M.S.P.R. 218 (1991)	19
United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909)	17
U.S. Army Health Clinic, Fort Ritchie, MD, 9 FLRA 935 (1982)	9
Vaca v. Sipes, 386 U.S. 171 (1967)	15

STATUTES AND REGULATIONS:

Civil Service Reform Act of 1978, Pub. L. No. 95-454, Tit. VII, 92 Stat. 111 *et seq.*	2
5 U.S.C. § 1205	4
§ 1221(c)(1)	8
§ 1214(b)(1)(A)(i)	8
§ 4303(b)-(d)	4
§ 7103(a)	3
§ 7106(a)(2)(A)	3
§ 7106(b)(2)	3
§ 7116	3
§ 7116(b)(5)	15
§ 7117(a)	3
§ 7121(a)	3
§ 7121(b)	3
§ 7121(b)(1)(B)	14, 16
§ 7121(b)(1)(C)(iii)	15

TABLE OF AUTHORITIES—Continued

	Page
§ 7121(b)(3)(B)	3
§ 7121(b)(3)(C)	3, 4
§ 7121(c)	3
§ 7121(c)(3)	3
§ 7121(e)(1)	4
§ 7121(e)(2)	4, 19
§ 7121(f)	4
§ 7122	3
§ 7503	2, 7
§ 7503(a)	4
§ 7511(a)(1)	2
§ 7512	4
§ 7513(a)	2, 4
§ 7513(b)	7
§ 7513(b)(4)	9
§ 7532	7
§ 7701(a)	2, 4
§ 7701(b)(3)	4
§ 7701(c)	4, 19
§ 7701(c)(1)(B)	4, 11
§ 7701(c)(2)	4
§ 7703(d)	4

MISCELLANEOUS:

Cindy Cole Ettingoff & Gregory Powell, Alternative Dispute Resolution Symposium: *Use of Alternative Dispute Resolution in Employment-Related Disputes*, U. of Mem L. Rev. 1131 (Spring 1996)	16
Elkouri and Elkouri, *How Arbitration Works* (5th Ed. 1997)	16

TABLE OF AUTHORITIES—Continued

Page

National Agreement Between Internal Revenue Service and NTEU, National Office Regional and Districts (NORD) V *available at* www.nteu47.org 15

Paul Alan Levy, *Deferral and the Dissident*, U. Mich. J.L. Ref. 479 (Spring and Summer 1991) 16

IN THE
Supreme Court of the United States

No. 00-758

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS* [1]

Amicus Curiae, the National Treasury Employees Union (NTEU), is a federal sector labor organization that is the exclusive collective bargaining representative of approximately 155,000 employees of the federal government nationwide. NTEU and the employees it represents have a vital interest in the resolution of the issue presented in this case: whether the Merit Systems Protection Board (MSPB) has authority to finalize an adverse action that the employing agency has expressly based prior disciplinary actions either overturned by an arbitrator, or subject to being overturned in pending arbitration proceedings.

[1] The parties have consented to the filing of this brief, which was authored in whole by NTEU counsel, and their letters of consent have been lodged with the Clerk of this Court.

STATUTORY BACKGROUND

The issue here is one of statutory construction regarding the complementary and sometimes overlapping roles that the Merit Systems Protection Board (MSPB or Board) and arbitrators play under the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 111 *et seq.* (CSRA or Act). In particular, resolution of this case depends on the proper delineation of statutory authority between the MSPB and arbitrators when reviewing penalties stemming from adverse action taken against employees for the "efficiency of the service," under Chapter 75 of the Act (5 U.S.C. 7503(a), 7513(a)).

Chapter 75 of the Act includes action of the type taken below by petitioner, United States Postal Service, against respondent, Maria A. Gregory, based on alleged misconduct. That statutory chapter covers federal employees with the requisite tenure in the competitive service, as well as certain individuals in the excepted service, including "preference eligibles" like respondent. *See* 5 U.S.C. 7511(a)(1). Adverse actions for misconduct often involve "progressive discipline" such as that imposed by the Postal Service here, where management expressly invokes prior discipline as justification for imposing increasingly harsher penalties for later incidents of alleged misconduct. In this case, the Board's statutory authority to review the validity of respondent's removal from federal service for the last incident intersected with the statutorily sanctioned jurisdiction of arbitrators under a collective bargaining agreement to review charges of prior disciplinary action leading up to that ultimate penalty.

Title VII of the Act, 5 U.S.C. 7701 *et seq.*, requires federal agencies and unions representing agency employees to "negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule or regulation. 5 U.S.C. 7103(a), 7116, 7117(a). Even

matters specifically reserved to agency management discretion (*e.g.*, the right to suspend or remove employees, 5 U.S.C. 7106(a)(2)(A)), are subject to negotiations concerning procedures that management officials will observe in exercising their authority. 5 U.S.C. 7106(b)(2). In the provision applicable to employees in the competitive service, the CSRA requires that all collective bargaining agreements (CBAs) provide for a grievance procedure and binding arbitration for the resolution of disputes arising under such agreements. 5 U.S.C. 7121 (a) & (b). The union has a statutory right to be present during all grievance proceedings (5 U.S.C. 7121(b)(3)(B)); only the union or the agency may invoke binding arbitration (5 U.S.C. 7121(b)(3)(C)).

The CSRA also contains a comprehensive scheme governing agency personnel actions against competitive service employees. Under that scheme, workers represented by federal unions generally have only one avenue for challenging a "minor adverse action," which includes, for example, a reprimand or suspension of two weeks or less: they may file a grievance under the CBA procedures. 5 U.S.C. 7121(b) and (c).[2] In the grievance process, a higher level of agency management reviews the discipline proposed by lower-level management. These CBA procedures typically consist of two or three "steps," during which the employee challenges the proposed discipline before various levels of management. When disputes remain unresolved at the end of the steps, employees have no further recourse absent consent of their union, which has the option of invoking arbitration to obtain independent review of the disciplinary action. In such proceedings, the arbitrator's award is final and binding on both parties, with only limited

---

[2] Two exceptions not applicable to this case permit appeal of a disciplinary action to the MSPB: when the employee alleges protected whistle-blowing or discrimination on the basis of military service. 5 U.S.C. 7121(c)(3).

review by the Federal Labor Relations Authority (FLRA). 5 U.S.C. 7122.

For major adverse actions (removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 days or less), the Act establishes procedural requirements and gives the employee the option of seeking review before the MSPB. The Board has the duty to review compliance with procedures and ensure that the agency-employer proves, by a preponderance of the evidence, that the action "promotes the efficiency of the service." 5 U.S.C. 1205, 4303 (b)-(d), 7503(a), 7513(a), 7701(a) & (c)(1)(B) and (c)(2). If agency management meets its burden of proving the underlying charges, the Board reviews the agency's choice of penalty for abuse of discretion, with deference to the agency management's prerogative to choose the appropriate discipline. 5 U.S.C. 7701(b)(3). *See Lachance v. Devall,* 178 F.3d 1246, 1255-1258 (Fed.Cir. 1999).

Competitive service employees covered by a collective bargaining agreement have two options when challenging a major adverse action: following the contract grievance arbitration procedure or appealing to the MSPB. 5 U.S.C. 7121(e)(1), 7512, 7513(a). If the employee forgoes MSPB review and the union invokes binding arbitration (5 U.S.C. 7121(b)(3)(C)), the arbitrator is bound to apply the same legal standards as the Board would if the matter had been appealed to it. 5 U.S.C. 7701(c), 7121(e)(2). *Cornelius v. Nutt,* 472 U.S. 653 (1985). The Act provides for judicial review of both MSPB decisions and arbitration awards in adverse action cases "in the same manner and under the same conditions." 5 U.S.C. 7121(f), 7703. Such appeals lie exclusively in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(d).

In sum, the CSRA provides for collective bargaining agreements with arbitration as the means of resolving disputes under those agreements; entrusts arbitrators with

exclusive and final review authority over minor adverse actions, subject to limited review by the FLRA, rather than the MSPB; establishes standards and procedures governing major adverse actions; provides for appeals to the MSPB from such adverse actions; recognizes arbitration as an equivalent alternative appeal route for challenging major adverse actions when employees are covered by collective bargaining agreements; and provides for judicial review of both MSPB and arbitration decisions regarding major adverse action awards in a single court of appeals under the same conditions.

SUMMARY OF ARGUMENT

The Federal Circuit correctly interpreted the Act to prohibit the MSPB from finalizing a major adverse action whose legitimacy depends on the outcome of a pending arbitration proceeding. The CSRA allows an employing agency to impose progressive discipline leading to removal of an employee from federal service based on prior disciplinary actions challenged in arbitration, but the legality of such removal is contingent on the arbitrator's upholding the validity of those previous agency actions. The statutory scheme does not permit an agency to bypass the proceedings to which the statute entrusts review of disciplinary action.

Moreover, the ruling below correctly harmonizes the MSPB's authority with that conferred by statute on federal sector arbitrators. The Board may not vitiate the arbitrator's role by finalizing an employee's removal that is expressly based on prior disciplinary action pending in arbitration. The Board has no statutory authority for the approach it took below, lightening management's burden of proof and substituting its own cursory review of an incomplete administrative record for determinations made by an arbitrator on a full administrative record developed at an evidentiary hearing.

Far from producing the adverse effects imagined by the government, the ruling below best effectuates the overarching statutory goal of promoting efficiency in the federal service. The Federal Circuit's ruling does not preclude management from pursuing, consistent with the Act, appropriate adverse action, while relevant grievance proceedings continue apace in compliance with negotiated deadlines that unions and employees have no incentive or opportunity to manipulate. What the court of appeals' decision does require is that the *Board* defer ruling to avoid the risk of finalizing a removal based on prior discipline that an arbitrator has declared, or may yet declare, invalid.

To permit a removal to become final in these circumstances is at odds with the statutory scheme, promotes inefficiency, and also raises serious due process issues for an improperly terminated employee. Accordingly, as in other situations where the Board abstains from deciding an appeal until another adjudicator rules on a related issue, the proper path is to await the outcome of an arbitration award that will have a direct impact on the MSPB proceeding. Indeed, under the MSPB's own precedent, principles of fundamental fairness prohibit the Board from relying on charges that "have never been proven." *Howard v. Dept. of the Army*, 6 M.S.P.R.205, 206 (1981).

In addition, the government makes the unpersuasive suggestion that due process concerns are insubstantial here because the Board may consider reopening a concluded removal proceeding. This possibility provides too little and comes too late for employees officially removed from federal service for reasons ultimately proven, in ongoing pending proceedings, to be unlawful. Further, the government's reliance on the Board's discretion to reopen proceedings is wholly irrelevant to employees whose adverse action appeals are adjudicated by an arbitrator. Arbitrators have no authority to unilaterally reopen proceedings once an arbitral decision has become final.

ARGUMENT

I. THE RULING BELOW CORRECTLY CONSTRUES THE SCOPE OF THE MSPB'S AUTHORITY OVER ADVERSE ACTION APPEALS WHOSE VALIDITY DEPENDS ON THE OUTCOME OF PENDING GRIEVANCE AND ARBITRATION PROCEEDINGS

A. The Federal Circuit's Decision Does Not Affect Management's Ability to Impose Adverse Action Based on Prior Discipline

Contrary to the expansive interpretation upon which the government bases its entire brief, the ruling below does not rewrite the rules governing management's ability to remove an employee from the workplace promptly after an alleged incident of misconduct. Rather, the decision simply interprets the MSPB's statutory authority to *finalize* such a removal when its validity depends on the outcome of pending arbitration proceedings.

Read properly, the Federal Circuit's ruling does not preclude management from taking action on the basis of prior disciplinary actions, even when they are challenged in an ongoing grievance proceeding. More specifically, nothing in the ruling below restricts management's statutory prerogative to impose discipline without delay, once the employee is afforded the procedural protections prescribed by the Act. *See* 5 U.S.C. 7503, 7513(b), 7532. The court's decision is instead aimed at the propriety of the *Board's* reliance on challenged prior disciplinary history.[3] That the agency is not

---

[3] That the court of appeals was focused on the Board's, rather than management's, reliance on prior discipline is made clear by the following statement (Pet. App. 7a; emphasis supplied):

> Here, as we noted above, *the Board (and, it appears, the Postal Service)* used Mrs. Gregory's prior disciplinary history as a primary factor in determining the reasonableness of the penalty. Because

hand-cuffed as the government suggests (Pet. Br. 32-33; 40) is further made clear by the fact that the statute does not give employees a right to obtain a stay of the type of adverse action at issue in this case.[4] Thus, under the statutory scheme left undisturbed by the ruling below, an employee's discipline commences immediately upon completion of pre-discipline hearing rights, which are not at issue in this case.

B. The Ruling Below Properly Interprets the MSPB's Statutory Authority, As Balanced Against the Complementary Jurisdiction of Arbitrators

As the court of appeals noted, its treatment of disciplinary actions under challenge in ongoing proceedings is rooted in the Board's own precedent regarding progressive discipline based on prior penalties (Pet. App. 7a). In the MSPB's own words, "fundamental fairness requires that the Board not rely on charges which have never been proven." *Howard v. Dept. of the Army*, 6 M.S.P.R. at 206. Similarly, the Board has ruled that an agency may not justify a penalty determination grounded on a prior discipline reversed in grievance proceedings. *Jones v. Dept of the Air Force*, 24 M.S.P.R. 429, 431 (1984). Indeed, the MSPB must take this position to avoid a direct conflict with the Federal Labor Relations Authority, which has exclusive statutory authority to review arbitration decisions addressing minor adverse action. The FLRA has made it clear that an agency commits a statutory

---

those prior actions that were the subject of on-going grievance proceedings could not be used, *the Board* abused its discretion in relying upon them. Accordingly, *the Board's* determination that the penalty of removal was reasonable must be set aside.

[4] Although a union may negotiate stay provisions, the CSRA itself provides for a stay only in limited circumstances, not pertinent here: on request by an employee in whistleblower situations, and on request by the Office of Special Counsel where there is an alleged prohibited personnel. *See* 5 U.S.C. 1221(c)(1); 1214(b)(1)(A)(i).

unfair labor practice if it continues to rely on prior disciplinary action reversed by an arbitrator, as justification for progressive discipline in later cases. *American Federation of Government Employees, Local* 2369, 23 F.L.R.A. 304 (1986); *U.S. Army Health Clinic, Fort Kitchie, MD*, 9 F.L.R.A. 935 (1982).

Notwithstanding this precedent, the Board's approach would finalize adverse actions based on charges that an arbitrator could well invalidate after a hearing, just as happened in respondent's case. Such an approach conflicts with an important role that Congress assigned the Board: ensuring that an agency taking adverse action against employees would provide "the specific reasons therefore." 5 U.S.C. 7513(b)(4). Thus, the Act contemplates that the Board ascertain, upon review, that there be a "precise correspondence" between the discipline at issue and the agency's specific justification for imposing it. *Lachance v. Devall*, 178 F.3d 1246, 1258 (Fed. Cir. 1999). The Board has no means of ensuring this requisite correspondence, however, where an agency's justification for a penalty is a prior disciplinary record being challenged in other proceedings. Only upon completion of grievance and arbitration challenges to prior charges can the Board fulfill its statutory obligation to scrutinize the agency's "specific reasons" for imposing the progressive discipline based on those earlier disciplines.[5]

The Federal Circuit's ruling leaves undisturbed the Board's seminal decision regarding the scope of its review of prior disciplinary actions used by an agency to justify the penalty

---

[5] The decision leaves intact the Board's list of factors that management must balance in setting a penalty. Demonstrating how crucial it is for prior discipline to be justified, three of the twelve *Douglas* factors relate to priors: The first includes whether the current offense was "frequently repeated"; the third is "the employee's past disciplinary record"; and the tenth is the "potential for the employee's rehabilitation." *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

of removal. *See Bolling v. Dept. of Air Force,* 8 M.S.P.R. 335 (1981). Under *Bolling*, where the Board reviewed a removal decision based on prior discipline, the Board determined that it would review "the documentary record of the past action," including "the record of any agency administrative proceeding held in connection with the action." The Board did so as part of a process to "determine the validity of that action as one of the reasons for the current action." *Id.* at 338. The Board explained that management could justify an adverse action based on prior discipline so long as the earlier action is a "matter of record," and the Board can verify that the employee received the minimum procedural protection of written notification of charges and review before a different agency authority than the manager who proposed them. If these basic criteria are met, the Board upholds the prior discipline unless "clearly erroneous," leaving the Board with a "definite and firm conviction that a mistake has been committed." *Id.* at 339 (citations omitted).

The *Bolling* record comprised a *complete* administrative record concerning the prior discipline, thus affording a reasonable opportunity for the Board to determine the validity of an earlier disciplinary action. The MSPB has, however, expanded application of *Bolling* to cases, such as the instant one, involving direct challenges to prior charges still being scrutinized during grievance or arbitration. *See, e.g., Freeman v. Dept. of Transp.*, 20 M.S.P.R. 290 (1984); *Carr v. Dept. of the Air Force,* 9 M.S.P.R. 714 (1982). In these cases, the Board extended, in conclusory fashion, the cursory *Bolling* review to cases where the administrative record is *incomplete* and lacks essential information about prior disciplinary action. This the Board did without any attempt to explain the inherent conflict with the *Bolling* framework, which had assumed review of a complete administrative record that allowed the accurate assessment of the "validity" of prior discipline.

The Board had no legal justification for extending *Bolling* standards—which were designed as minimum safeguards for employees making collateral attacks on final discipline—to undermine statutorily granted grievance and arbitration rights of employees who are directly challenging prior discipline. It was arguably appropriate to assume the validity of prior discipline in the original *Bolling* context, where the employee made a belated collateral attack and "did not grieve or otherwise contest any of the previous disciplinary actions." *Bolling*, 9 M.S.P.R. at 340. Where grievance and arbitration rights provided by statute are invoked, however, the Act does not allow the Board to substitute its own rubber-stamp review of the same challenged adverse actions and bestow the deferential "clearly erroneous" standard to management's finding of employee misconduct.[6]

On the contrary, where personnel actions are challenged before an arbitrator or the MSPB, the Act requires management to justify its decision by a "preponderance of the evidence." 5 U.S.C. 7701(c)(1)(B) and 7121(e)(2). Given this burden of proof, it is particularly appropriate that federal arbitrators, similar to their private sector counterparts, refuse to consider prior discipline while it is under review in pending grievance proceedings or before another arbitrator.

---

[6] The Board routinely upholds the validity of management's prior disciplinary actions as not "clearly erroneous." *See, e.g., Taylor v. Department of Justice*, 60 M.S.P.R. 686, 689-90 (1994); *Delgado v. Dept. of the Air Force*, 36 M.S.P.R. 685, 689 (1988); *Morgan v. Department of* Justice, 63 M.S.P.R. 58, 61 (1994); *Rewald v. U.S. Postal Service*, 34 M.S.P.R. 13, 16 (1987); *Hubbard v. U.S. Postal Service*, 32 MSPR 505, 508-09 (1987). We have located only one instance in which the Board has overturned management's prior disciplinary action under this highly deferential standard: in a unique case where the Board allowed the U.S. Postal Service to rely on one prior discipline, and merely prevented its reliance on a second penalty for the same incident of misconduct, which would have been a clear violation of law. *Eichner v. U.S. Postal Service*, 83 M.S.P.R. 202, 210 (1999).

Compare *Metal Trades Council*, 87 FLRR 2-1497, LAIRS 18045 (1987) (earlier "suspension grievance having yet to be finalized leaves this arbitrator no alternative but to disregard its effect and impact on rendering a decision" regarding validity of the federal employee's ultimate removal) with *In re Arbitration between Island Creek Coal Co. and UMW*, 1996 WL 607192 (Case No. 93-23-96-06) (March 15, 1996) (earlier suspension of private-sector employee that was pending before another arbitrator "cannot be held against the Grievant" because "there is no way of determining at this point whether or not those charges against the Grievant are valid").

Where the agency-employer chooses to base a major adverse action on prior discipline, the Board's review, to be consistent with the statutory scheme, must necessarily await resolution of any pending statutorily sanctioned challenges to those priors. As discussed, the CSRA gives arbitrators and the FLRA, not the Board, statutory authority to determine the validity of minor adverse actions like respondent's three prior disciplines. Until arbitrators resolve pending challenges to such earlier discipline, by deciding whether the agency justified its action by a preponderance of the evidence, the Board simply cannot fulfill its statutory duty of ensuring the validity of resulting major adverse action.

C. The Ruling Below Promotes Efficiency.

The Federal Circuit's opinion has limited impact on the Board's processes and merely ensures that it handle progressive discipline in the most efficient matter. As evidenced by initial decisions issued in the wake of the appellate court's opinion, the MSPB can proceed to finalize progressive discipline without delay where management has provided adequate justification that does not rely on prior discipline still being challenged elsewhere. *See, e.g., Morales v. Dept. of the Navy*, 100 F.M.S.R. 84248 (2000); *Pride v. U.S. Postal Service*, 100 F.M.S.R. 84436 (2000); *Rios v.*

Dept. of Veterans Affairs, 100 F.M.S.R. 84209 (2000); and *Fenwick v. Dept. of Veterans Affairs*, 100 F.M.S.R. 84542 (2000). The Federal Circuit's decision only affects the MSPB in those relatively few cases involving adverse action based squarely on prior discipline that is still pending at the grievance or arbitration stage when the Board is ready to exercise its review. Such cases arise only when management has expressly invoked a specific prior discipline in the notice of proposed action regarding a later incident of alleged misconduct. *See Harris v. Dept. of Transp.*, 29 M.S.P.R. 430 (1985) (agency could not rely on a prior discipline that it failed to reference in the proposal notice for the action under review). In those instances, the statutory scheme simply requires the MSPB to defer finalizing the dependant adverse action until completion of the grievance and arbitration challenges. This interpretation not only harmonizes the Board's role with that of arbitrators, but it is the most efficient and fair way for the Board to proceed.

Given the posture of the progressive discipline chosen by the agency-employer, the only reasonable approach—and the only one consistent with the statutory scheme—is for the Board to defer review of an employee's removal pending the outcome of arbitration proceedings that will necessarily affect the validity of its own ruling. The Board has long recognized its statutory authority to abstain from deciding an appeal and defer to another adjudicator reviewing an identical issue. *See, e.g., Key v. U.S. Postal Service*, 31 M.S.P.R. 197, 200 (1986) (Board abstained and deferred to a district court's ruling on an EEO issue and ultimately dismissed a petition for enforcement in light of a settlement in the court proceeding). As the MSPB has recently explained, its administrative judges have broad discretion to grant continuances or even dismiss appeals without prejudice to refiling when a continuance threatens to be too lengthy or indefinite. *Milner v. Dept. of Justice*, 87 M.S.P.R. 660, 666 (2001). Administrative judges, in fact, have often found good cause to defer to

pending arbitration proceedings. *See Figueroa v. Dept. of Treasury*, 98 F.M.S.R. 84655 (1998); *Hall v. Tennessee Valley Authority*, 96 F.M.S.R. 80050 (1997) (dismissals without prejudice to refiling after resolution of arbitration); *Thomas v. U.S. Postal Service*, 97 F.M.S.R. 82584 (1997) (even if Board had jurisdiction, it would abstain and defer in light of pending arbitration on same issue). Particularly given this precedent, there is no justification for the Board forging ahead to finalize an employee's adverse action based on prior discipline being reviewed in ongoing grievance proceedings, rather than awaiting a ruling by the arbitrator entrusted with exclusive statutory jurisdiction over such matters.

Contrary to the government's contention (Pet. Br. 34-36), the lower court's ruling does not encourage employees to prolong grievance proceedings to protect themselves against possible discipline in the future. Because disciplined employees have no means of obtaining a stay of suspensions or removals, they have every incentive to pursue grievance and arbitration as expeditiously as possible, in the hope of being put back on the job and recovering back pay. The government wrongly suggests that grievance proceedings are open-ended and subject to mischievous manipulation by employees. By statutory mandate, any negotiated grievance procedure must "provide for expeditious processing." 5 U.S.C. 7121(b)(1)(B). Management and unions thus negotiate specific deadlines, which can be extended only by agreement of the parties, placing outer limits on the completion of the employee's role.

As delineated in NTEU's own collective bargaining agreements, grievance procedures are designed to be expeditious, starting with two or three "steps" involving meetings or exchanges of written communications designed to resolve disputes without resort to arbitration. Typical time frames for accomplishment of all pre-arbitration grievance steps range from 60 to 85 days, half of which are allotted to

the agency. *See, e.g.*, National Agreement Between Internal Revenue Service and NTEU, National Office Regional and Districts (NORD) V Art. 38 (Disciplinary Actions), Art. 39 (Adverse Actions) and Art. 41 (Employee Grievance Procedure), *available at http://www.nteu47.org*. Management thus retains substantial control over the length of any given grievance and arbitration proceeding. Not only can it refuse to grant extensions of time to the union, but management can also substantially reduce the time necessary to finish the grievance steps, merely by taking less than the full time available for meeting its own deadlines.

Nor would the ruling below increase the number or length of arbitrations. Employees themselves have no statutory right either to invoke arbitration on their own, or to insist that a union invoke arbitration on their behalf. *See* 5 U.S.C. 7121(b)(1)(C)(iii) (authorizing employees' exclusive representative to invoke arbitration). Unions lack the motivation and means to exercise their statutory invocation rights frivolously. Invoking meritless arbitrations for the purpose of protracting grievance proceedings would likely demonstrate bad faith and might constitute a statutory unfair labor practice. *See* 5 U.S.C. 7116 (b) (5). Finally, meretricious arbitration is something that unions can ill afford to do. Compensation to arbitrators and investment of considerable staff time create a serious drain on limited union funds and erect a realistic barrier to unwarranted invocations. *See Schneider Moving & Storage Co., v. Robbins*, 466 U.S. 364, 376 (1984); *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (employees cannot force their unions to invoke arbitration, which is the "most costly and time-consuming step in the grievance procedures.")

The Federal Circuit has recently clarified that the ruling in this case did not require the Board to stay its hand for resolution of disciplinary actions being reviewed by the EEOC for complaints of discrimination. *Blank v. Dept. of the*

Army, 247 F.3d 1225 (2001).[7] The ruling below therefore requires that the Board defer only to the "expeditious processing" of grievance and arbitration decisions. *See* 5 U.S.C. 7121(b)(1)(B). Under NTEU's collective bargaining agreements, for example, the union has no more than 20 or 30 days to invoke arbitration after conclusion of the grievance steps. Once the parties choose an arbitrator under the contract's pre-arranged procedures, a hearing usually takes only a day. *See* Cindy Cole Ettingoff & Gregory Powell, *Alternative Dispute Resolution Symposium: Use of Alternative Dispute Resolution in Employment-Related Disputes*, U. of Mem. L. Rev. 1131, 1136 (Spring 1996) ("arbitration hearings typically last one day"); Paul Alan Levy, *Deferral and the Dissident*, U. Mich. J.L.Ref. 479, 557 (Spring and Summer 1991) ("the average labor arbitration hearing lasts one day"). In addition, the agency and union may impose deadlines on the arbitrator, requiring decisions within a limited amount of time after conclusion of the hearing. *See generally*, Elkouri & Elkouri, How Arbitration Works at 379-381 (5th Ed.). *See also AFGE, Local 2029*, 48 FLRA 95 (1993) (tardy arbitration award stands where complaining party failed to object before the ruling).

Contrary to the government's suggestion (Pet. Br. 33-36), the unsynchronized review of progressive discipline presented in this case will remain a rare occurrence, particularly given the prevalent practice of "bundling" minor adverse actions. When management takes a series of disciplinary actions against an individual employee within a short timeframe, the parties typically agree to consolidate grievances

[7] The MSPB recently read the Federal Circuit's *Blank v. Dept. of the Army* ruling broadly, allowing management to rely on disciplinary action being challenged on discrimination grounds in a grievance proceeding pending at the employing-agency level. *Powell v. Dept. of Defense*, 2001 MSPB LEXIS 508 (MSPB Docket No. AT-0752-00-0746-I-1) (June 7, 2001).

into a single proceeding. *See, e.g., AFGE, Local 215 and Dept. of Health and Human Svcs., Social Security Admin, Office of Hearings and Appeals*, 93 FLRR 2-1373 (1993). This efficient practice avoids the need for multiple proceedings and allows the arbitrator to hear all relevant evidence regarding the full range of disciplinary actions, permitting him to rule on the validity of all challenged adverse actions.

The instant case is extremely atypical in terms of the long period of time in which two of the minor adverse actions against grievant have remained unresolved by an arbitrator. The only explanation in the record is respondent's assertion that the lack of arbitral resolution stems from management's own tactics: securing dismissals of scheduled arbitrations on the grounds that the Board had already finalized respondent's removal from service. *See* Resp. Br. 9-11. If so, of course, the government must not be heard to complain about the lack of resolution of the merits of the underlying adverse actions (Pet. Br. 34). In any event, the delays here are extraordinary and in no way indicative of the normal speed of grievance and arbitration proceedings.

D. The Board's Position Violates Its Own Principle of Fundamental Fairness.

The Board's practice of finalizing employee removals, notwithstanding the pendency of highly relevant pending adverse action proceedings, directly conflicts with its own stated rule against reliance on unproven charges out of concern for "fundamental fairness." *Howard v. Dept. of the Army*, 6 M.S.B.R. at 206. As in other cases where a party's statutory interpretation raises constitutional concerns, the Court should reject the Board's construction to avoid serious due process issues. *See Jones v. United States*, 526 U.S. 227, 239 (1999); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("where a statute is susceptible of two constructions, by one of which

grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.")

Final termination of a government employee is a serious deprivation of property.[8] This Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 543 (1985) (citations omitted). The removed employee may be without a paycheck indefinitely, without a source of income or means of making financial plans. Being removed for cause may make it difficult, if not impossible, to find other employment, in addition to creating intangible harms, including loss of self-esteem. The Board should not be allowed to forge ahead to finalize a termination based on prior discipline that may prove invalid.

Tacitly acknowledging that the Board's position can lead to the wrongful removal of employees, the government maintains that this unfairness is alleviated because employees can file a motion requesting the Board to reopen proceedings, should subsequent arbitrations undermine the justification for their removal from service. Pet. Br. 33. This approach obviously provides the employee with no protection at all if, as apparently happened here, the agency-employer cuts off ongoing arbitrations on the basis of the Board's decision to finalize the employee's removal from federal service. *See supra* at 17. Even where management does not interrupt the grievance and arbitration process, reliance on the Board's willingness to exercise its discretion provides insufficient protection to the unlawfully discharged employee, who should not bear the burden of trying to reopen proceedings.

[8] Public employees such as respondent, "who can be discharged only for cause have a constitutionally protected property interest" in their jobs and cannot be fired without due process. *Gilbert v. Homar,* 520 U.S. 924, 930 (1997) (citations omitted). *See also Lachance v. Erickson,* 522 U.S. 262, 266 (1998).

See Milner v. Dept. of Justice, 87 M.S.P.R. at 666; *Thomas v. Dept. of Veterans Affairs,* 51 M.S.P.R. 218, 221 (1991) (continuance is preferred option, where employee objects to dismissal of an appeal without prejudice to refiling, in part because employee "should not face the additional burden of refiling or otherwise reinstating his appeal."). Instead, management must bear the affirmative burden of bringing progressive discipline into compliance with an arbitration ruling overturning prior discipline, as it must do to avoid committing an unfair labor practice under FLRA precedent. *See supra* at 8-9.

Moreover, the government's effort to avoid due process concerns by relying on the Board's authority to reopen a concluded removal proceeding is inapposite for those many employees who are covered by a CBA and have chosen the statutorily sanctioned grievance-arbitration procedure to appeal an adverse action. Reopening proceedings regarding minor or major adverse actions is not an option for federal sector arbitrators.[9] Unlike the Board, arbitrators have no authority to reconsider their rulings upon the request of a single party. *Dept. of Defense, Air Force, Seymour Johnson AFB and NAGE Local R5-188,* 56 FLRA 249 (2000); *Oversees Federation of Teachers, AFT and DOD Dependents School,* 32 FLRA 410 (1988). After issuing a final award, all power of the arbitrator has been exhausted, unless the parties jointly confer new authority; a request for reconsideration by only one party has no effect. *See Devine v. White,* 697 F.2d 421, 433 (D.C. Cir. 1983). In other words, management could effectively block any attempt by an employee to reopen arbitration proceedings whose validity is called into question by another arbitral ruling.

[9] As noted *supra* at 4, the Court's resolution of the question presented in the instant case would bind arbitrators, as well as the MSPB. *See* 5 U.S.C. 7701(c), 7121(e)(2).

Thus, the government's reliance on the Board's authority to reopen concluded proceedings only compounds—and certainly does not cure—the fundamental unfairness of allowing employees to be terminated by relying on charges ultimately proven in pending ongoing proceedings to have been unfounded. Employees, particularly those covered by a CBA, could well prevail in proceedings challenging earlier discipline only to be left without any recourse as to resulting terminations. Such a result is untenable and cannot be squared with the due process concerns the Board purportedly wishes to safeguard.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

GREGORY O'DUDEN *
General Counsel
BARBARA A. ATKIN
Deputy General Counsel
KERRY L. ADAMS
Associate General Counsel

NATIONAL TREASURY
EMPLOYEES UNION
901 E. Street, N.W.
Washington, D.C. 20004
(202) 783-4444

* Counsel of Record

June 2001